IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1682

JOHN FORAN,

Petitioner,

against

HON. PAUL METZ, Superintendent of Great Meadows Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7590

SHIRLEY ADELSON SIEGEL
Solicitor General

GEORGE D. ZUCKERMAN
Assistant Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND REGULATIONS

TABLE OF AUTHORITIES

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1682

JOHN FORAN,

Petitioner,

against

HON. PAUL METZ, Superintendent of Great Meadows Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

Questions Presented

1. Whether review should be denied of petitioner's speedy trial claim since the District Court denied leave to appeal it as "frivolous" and the Circuit Court did not review that claim?

2. Whether review should be denied of petitioner's Interstate Agreement on Detainers claim because it was raised in the courts below as a Sixth Amendment or Federal statutory claim and is raised here for the first time under the Fourteenth Amendment?

3. Whether review should be denied of petitioner's Interstate Agreement on Detainers claim since the decisions below were based on concurrent findings of fact by the District and Circuit Courts?

4. Whether review should be denied where petitioner, by introducing evidence on his Federal habeas corpus application that he failed to provide to the State appellate courts, failed to exhaust State remedies?

Statement of Facts

Petitioner was found guilty in Supreme Court, New York County, following a jury trial, of attempted murder and was sentenced on February 18, 1975, to an indefinite term of imprisonment of from seven to twenty-one years. His conviction was affirmed without an opinion by the Appellate Division, First Department, *People* v. *Foran,* 53 A D 2d 1065 (1976), and leave to appeal to the New York Court of Appeals was denied by an unpublished order without an opinion (Aug. 24, 1977).

At the time he prepared his petition for a writ of habeas corpus to the United States District Court for the Southern District of New York, he was imprisoned at Great Meadows Correctional Facility. By the time it was served, he had been tranferred to Auburn Correctional Facility. When argument was heard before the United States Court of Appeals for the Second Circuit, he was being detained at Green Haven Correctional Facility, where he remains at this time.

Petitioner's application to the District Court raised three claims, quoted in the decision of the District Court (4a).* The District Court rejected his allegation of error in the State court's jury instructions as to reasonable doubt (5a), and found his Fourth Amendment objections

* References to documents in Petitioner's Appendix to his Petition for Certiorari are indicated by the suffix "a".

to the introduction of evidence unreviewable by Federal habeas corpus proceedings (7a). It reviewed at length his Sixth Amendment claim that he was denied a speedy trial and rejected it (8a-13a).

On its own motion, the District Court also construed his speedy trial claim to include a separate claim of violation of Federal rights based on the Interstate Agreement on Detainers* (13a). It found, however, that a violation of the time limitation of the Interstate Agreement on Detainers (15a, 18a):

> "provides no independent basis for the grant of a writ of habeas corpus under 28 U.S.C. § 2254. Rather, such claims should be a factor to consider in determining whether a petitioner's sixth amendment speedy trial rights were violated. See *Barker* v. *Wingo,* 407 U.S. 514, 530 (1972). Nevertheless, the dismissal of petitioner's claims need not be based solely on that ground. Even construing this developing area of the law most favorably to petitioner, and reviewing his claims 'de novo', the Court concludes that the limitations of the Interstate Agreement on Detainers were not violated.
>
> ". . .
>
> "In sum, at least 109 days of delay are directly attributable to motion practice by petitioner and his codefendants, and the unavailability of police witnesses. Thus, the fact that petitioner's trial did not commence until ninety-two days after the otherwise applicable limitation of the Interstate Agreement on Detainers, does not make out a violation of that statute."

* In State court, petitioner raised this claim solely under "the Interstate Agreement on Detainers." The State courts and the District Attorney understood this as a claim under N.Y. Criminal Procedure Law § 580.20. Until the District Court on its own motion raised the issue, no party or court had intimated that the Federal statute by which the United States became party to the Agreement, Pub.L. 91-538, 84 Stat. 1397, might in any way be involved in petitioner's case.

In making his speedy trial claim in the District Court, petitioner quoted extensively from minutes of pre-trial proceedings (Petition for a Writ of Habeas Corpus, at 6-13). He had made similar references to those minutes on his State appeal without providing them to the District Attorney or the State appellate courts, although it was his duty to do so if he had wanted them to be considered. (District Attorney's Brief, *People* v. *Foran* (1st Dept.), at 44-45, included as Exh. "C" to Respondent's Opposition to the Petition for Writ of Habeas Corpus, Affidavit of Robert J. Schack, Assistant Attorney General, sworn to March 16, 1978, para. "3", *Foran* v. *Metz* (S.D.N.Y.)). Respondent argued that petitioner's failure to provide those minutes to the State appellate courts deprived the State of a full and fair opportunity to consider the merits of the claim being presented to the District Court and constituted a failure to exhaust State remedies (Schack affidavit, *supra*, para. "3"; Respondent's Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, March 17, 1978, Point III, *Foran* v. *Metz* (S.D.N.Y.)). In reply, petitioner argued that the State courts could have sent for the minutes if they wanted and that the State was estopped from objecting on exhaustion grounds since the District Attorney had answered petitioner's speedy trial claim on the appeal. (Relator's Reply Memorandum of Law [April 1978], pp. 6-7, *Foran* v. *Metz* (S.D.N.Y.)).

The District Court did not rule on respondent's exhaustion argument. It required petitioner's attorney to produce the pre-trial hearing minutes (19a) and proceeded to rely on them heavily in its decision (10a-12a, 17a-18a).*

* Petitioner apparently did not fully comply with this order. When counsel was asked at oral argument before the Circuit Court if he had moved for a severance, he said he believed he had. Later that day he for the first time served respondent and the Circuit Court with minutes of his motion.

Petitioner applied for a certificate of probable cause as to all of his claims. The District Court found that appeal "would be frivolous" as to its decision on petitioner's jury instruction, Fourth Amendment and Sixth Amendment claims. It issued a certificate on the question of "a claimed violation of the Interstate Agreement on Detainers" (Certificate, January 29, 1979).

The Court of Appeals did not rule on respondent's exhaustion argument. It affirmed on the District Court's opinion "to the extent that it found no violation of the Interstate Agreement on Detainers" (2a). It did not rule on the speedy trial claim petitioner had attempted to raise in that Court.

The facts as to the crime and petitioner's trial are set forth at length in the decision of the District Court (6a, 8a-13a, 16a-18a) and are adopted by respondent on this opposition to the petition for a writ of certiorari.

POINT I

Review should be denied of petitioner's speedy trial claim since the District Court denied leave to appeal it as "frivolous" and the Circuit Court did not review that claim.

In denying petitioner relief on his speedy trial claim, the District Court made a detailed review of the record, finding that the delay was not excessive, was not due to improper prosecutorial actions, was largely due to petitioner's own delay in asserting his claim and was not prejudicial to his defense (12a-13a). It explicitly denied as "frivolous" his request to appeal the speedy trial issue (Certificate of Probable Cause, at 1, January 29, 1979), and granted the certificate solely on "a claimed violation of the Interstate Agreement on Detainers" (*id.*, at 2).

Petitioner did not seek a further certificate of probable cause from the Court of Appeals on his speedy trial claim. He nonetheless sought to raise it on that appeal. The Circuit Court did not rule on it (2a).

Review should be denied of petitioner's speedy trial claim because the District Court found it "frivolous" in denying the probable cause certificate. The District Court thus found that the claim did not present a question deserving appellate review. See *Alexander* v. *Harris*, —— F. 2d ——, August Term, 1978, No. 509, slip op. 1531, 1537 & cases cited (2d Cir. March 1, 1979); Blackmun, "Allowance of In Forma Pauperis Appeal in Section 2255 and Habeas Corpus Cases", 43 FRD 343, 351-3 (1967).

Moreover, this Court has regularly declined, on appeal and by certiorari, in habeas corpus and other types of cases, to review claims that were not passed on by the Courts below. See, e.g., *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970); *Federal Trade Comm'n.* v. *Simplicity Patterns Co.*, 360 U.S. 55, 61 n. 4 (1959); *Darr* v. *Burford*, 339 U.S. 200, 203 (1950). Since petitioner's speedy trial claim was not considered by the Circuit Court,* it is not suitable for review here.

* Moreover, as noted (*supra* at 4), petitioner even produced in Circuit Court facts about his State trial he had not provided the District Court. The case is thus improperly before this Court on a record including evidence not reviewed by the District Court.

POINT II

Review should be denied of petitioner's Interstate Agreement on Detainers claim because it was raised in the Courts below as a Sixth Amendment or Federal statutory claim and is raised herein for the first time under the Fourteenth Amendment.

As noted (*supra* at 3), petitioner originally raised his Interstate Agreement on Detainers claim as part of his Sixth Amendment speedy trial claim. The District Court, on its own motion, considered it as a Federal statutory claim (13a). The Circuit Court reviewed it on the latter basis (2a).

For the first time in his Petition for Certiorari (at 14), petitioner characterizes his claim as arising under the Fourteenth Amendment. It was not reviewed as such by the Courts below. The claim is, therefore, not suitable for review by this Court. See Point I, *supra*.

POINT III

Review should be denied of petitioner's Interstate Agreement on Detainers claim because the decisions below were based on concurrent findings of fact by the District and Circuit Courts.

As noted (*supra* at 3), the District Court gave two reasons for denying petitioner's claim of a violation of the Interstate Agreement on Detainers. First, while it noted that some courts have found that such an allegation if made out would be a ground for Federal habeas corpus relief from a State criminal conviction, it held on its own review of decisions by this Court and the Second Circuit that such an allegation does not provide an independent basis for habeas corpus jurisdiction (15a). As a second independent and sufficient reason, it concluded after a detailed review of the facts (16a-18a) that there was no

violation of the Agreement's time limitations (18a). On appeal, the Circuit Court explicitly affirmed the factual finding that there was no violation (2a).

This Court has noted:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Moreover, this Court has held that it

> "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Accord, *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner does not dispute the findings of the courts below as to the facts. Instead, he argues that as a matter of law the District and Circuit Courts were wrong in holding that the continuances granted in his case were necessary or reasonable.

First, he argues that the time taken to decide a discovery motion by one of his co-defendants should not be counted against him since petitioner had won an identical motion and the State should simply have consented to his co-defendant's motion (Petition for Certiorari, at 20). Since petitioner did not put these motions into his appendix before the Circuit Court below or in his present papers, he should not be allowed to rely on them here. See Points I, II *supra*. Assuming *arguendo* that the motions were identical, petitioner has not shown why the trial court or the District Attorney should have known the motions were the same or why the court and District Attorney were not entitled to enough time to determine if different considerations were relevant to discovery in

his co-defendant's case from his. Most importantly, as the District Court noted (16a), he "had notice of [his co-defendant's] motion and made no objection to the delay it would engender."

Second, petitioner objects to the exclusion of the time to decide his many motions to dismiss the indictment for denial of a speedy trial and for violation of the Interstate Agreement on Detainers (Petition for Certiorari, at 20). As the District Court held (17a):

> "Where a criminal defendant seeks an adjudication on an issue that would preclude a trial, he cannot thereafter argue that the time required to decide his claim should be held against the state for purposes of computing limitations of time . . . The Court declines to hold that state courts must decide such motions immediately upon filing on pain of dismissal of the indictment for delay."

Finally, petitioner argues that the adjournments due to engagements of counsel for one of his co-defendants should not be counted against him (Petition for Certiorari, at 21). As the District Court noted, however, this claim comes too late since "petitioner made no claim regarding a severance in his brief to the Appellate Division nor did he press any conflict with his codefendants in the pretrial motions filed in the trial court" (17a).*

In summing up, the District Court pointed out that (18a):

> "at least 109 days of delay are directly attributable to motion practice by petitioner and his codefendants, and the unavailability of police witnesses."

---

* As noted (*supra* at 4) petitioner only served the minutes containing his severance motion following oral argument before the Circuit Court. Even if the District Court was unaware of that motion, which should preclude its consideration here (Point I, *supra*), that Court correctly noted that petitioner did not assert it on his State appeal.

With those days excluded, petitioner's trial came within the Interstate Agreement on Detainers' time limitation of 120 days plus necessary and reasonable continuances from the lodging of the warrant. The Circuit Court explicitly affirmed on that basis.

Considered as factual findings, those holdings clearly come within this Court's "two court rule". Considered as mixed questions of law and fact, those holdings were clearly correct. In either case, review of the holdings should be denied.

POINT IV

Review should be denied because petitioner, by introducing evidence he had failed to provide to the State appellate courts, failed to exhaust State remedies.

Petitioner had indigent defendant status in the State courts. He could have requested a free transcript of the minutes of the pre-trial adjournments and hearings on the motions to dismiss. N.Y. Judiciary Law § 302. It was his duty to provide those minutes to the State courts if he wanted them considered on his appeal. 22A NYCRR §§ 600.10(b)(1)(iii), (d)(2)(iii). He did not do so.

For the first time in Federal court, petitioner produced the pre-trial minutes. While respondent believes that the District and Circuit Courts properly rejected petitioner's claims based on the new facts he presented therein, it is submitted that they erred in not considering respondent's argument that petitioner failed to exhaust his State remedies. By going outside the facts presented to the State appellate courts, petitioner deprived the State courts of a full and fair opportunity to consider the merits of his claims. *Stone* v. *Powell*, 428 U.S. 465, 495 (1976); *Pulver* v. *Cunningham*, 562 F. 2d 198, 201 (2d Cir. 1977).

In so noting, respondent does not seek certiorari on the exhaustion issue, but urges it as an initial reason certiorari should be denied on petitioner's claims. Assuming *arguendo* there were any merit in petitioner's claims, this Court would still not allow Federal habeas corpus relief on them since he did not first present them to the State courts.

As noted (*supra* at 4), petitioner made references on his State appeal to the pre-trial proceedings without providing the minutes to the courts. The District Attorney had argued that he was unable to respond adequately without the transcripts. In answering the petition herein, respondent was forced to conjecture, based on a documentary record instead of contemporaneous recollection, as to what the District Attorney with his intimate knowledge of the case would have argued had these claims been made on a proper record in State court. The State has been severely prejudiced as a result. Since the State appellate courts were deprived both of the facts on which the District and Circuit Courts and petitioner relied, as well as of the response of the District Attorney, it must be held that the Federal courts were not presented the same claims raised in the State appellate proceedings.

This Court has held that reasons of comity and finality in criminal litigation require a defendant to show both "cause" and "prejudice" for a procedural default in State trial court in order to raise the issue on a petition for Federal habeas corpus relief. *Wainwright* v. *Sykes*, 433 US 72, 88-91 (1977). While petitioner was arguably prejudiced by his failure to introduce the pre-trial minutes on his State appeal, his reasons for not doing so (that the State courts should have sent for the minutes and that the District Attorney's attempt to answer his speedy trial claim without the minutes somehow estops respondent from arguing failure to exhaust State remedies, *supra* at 4) are not legally sufficient cause for that failure to be excused

by a Federal court. See *Salter* v. *Johnston,* 579 F. 2d 1007, 1008 (6th Cir.), cert. den. —— U.S. ——, 99 S. Ct. 587 (1978).

"[C]onsiderations of comity and concerns for the orderly administration of criminal justice," *Francis* v. *Henderson,* 425 US 536, 539 (1976), have repeatedly led the Federal courts to dismiss for failure to exhaust State remedies where the petitioner presents a different factual basis than he argued in State court. See, e.g., *United States ex rel. Figueroa* v. *McMann,* 411 F. 2d 915, 916 (2d Cir. 1969); *Camara* v. *Bombard,* 455 F. Supp. 176, 178 (S.D.N.Y. 1978); *United States* v. *Fay,* 232 F. Supp. 139, 142 (S.D.N.Y. 1964).

In a case on all fours with this, *United States ex rel. Boodie* v. *Herold,* 349 F. 2d 372, 373-4 (2d Cir. 1965), cited in *Picard* v. *Connor,* 404 U.S. 270, 276 (1971), the United States Court of Appeals for the Second Circuit held that the failure of a New York defendant to provide the State appellate courts with the minutes of his arraignment deprived them of an "opportunity to pass upon the alleged denial of counsel in light of a ful record . . . The doctrine of 'exhaustion of state remedies' requires that the federal court refrain from acting until the state courts have been given that opportunity." It specifically found that the transcript could not be accepted for the first time by a Federal court before "an effort has been made to bring these facts to the attention of the state court," *id.,* 349 F. 2d at 373 n.1.

The Ninth Circuit in *Schiers* v. *California,* 333 F. 2d 173, 178 (9th Cir. 1964), also cited in *Picard* v. *Connor, supra,* 404 U.S. at 276, likewise found that State remedies had not been exhausted where the petitioner sought to introduce in Federal Court a transcript that had not been before his State's appellate courts.

Petitioner's claims herein were presented to the State appellate courts on a different record than here. He,

therefore, failed to exhaust effective, available State remedies and may not obtain relief on these claims pursuant to 28 U.S.C. § 2254. *Picard* v. *Connor, supra; Wilson* v. *Fogg,* 571 F. 2d 91, 92 (2d Cir. 1978). See also *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 8, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

SHIRLEY ADELSON SIEGEL
Solicitor General

GEORGE D. ZUCKERMAN
Assistant Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel